No. 3747

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United States

Circuit Court of Appeals

For the Ninth Circuit.

RAY McCURRY and JOHN WALL,
Plaintffs in Error,

vs.

UNITED STATES OF AMERICA,
Defendant in Error.

Transcript of Record.

Upon Writ of Error to the United States District Court of the District of Montana.

Filmer Bros. Co. Print, 330 Jackson St., S. F., Cal.

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INDEX TO THE PRINTED TRANSCRIPT OF RECORD.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

Names and Addresses of Attorneys of Record.

Messrs. MILLER, O'CONNOR & MILLER, Livingston, Montana,

Attorneys for Defendants and Plaintiffs in Error.

JOHN L. SLATTERY, Esq., United States Attorney, RONALD HIGGINS, Esq., Assistant U. S. Attorney, W. H. MEIGS, Esq., Assistant U. S. Attorney, all of Helena, Montana,

Attorneys for Plaintiff and Defendant in Error. [1*]

In the District Court of the United States, District of Montana.

No. 3674.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

RAY McCURRY and JOHN WALL,

Defendants.

BE IT REMEMBERED, That on October 28th, 1920, an indictment was presented and filed herein, being in words and figures as follows, to wit: [2]

*Page-number appearing at foot of page of original certified Transcript of Record.

Indictment.

United States of America,
District of Montana,—ss.

In the District Court of the United States of America, within and for the District of Montana, of the September term of the said District Court held at Butte, Silver Bow County, in the said State and District of Montana, in the year of our Lord one thousand nine hundred and twenty.

The grand jurors of the United States of America, duly impaneled, sworn and charged to inquire within and for the State and District of Montana, and true presentment make of all crimes and misdemeanors committed against the laws of the United States, within the said State and District of Montana, upon their oaths and affirmations do find, charge and present:

That one Ray McCurry and one John Wall, whose true names are to the grand jurors aforesaid unknown, late of the State and District of Montana, heretofore, to wit, on the first day of August, 1920, in the State and District of Montana, unlawfully and feloniously did make and ferment a certain mash fit for the production of spirits, in quantity about one hundred gallons, a more particular description of which is to the grand jurors aforesaid unknown, on premises other than a distillery duly authorized according to law, which premises were then and there known and described as the Ray McCurry ranch, situated on Section Thirty (30), in

Township Four (4), North of Range Eight (8), East of the Montana principal meridian; contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States of America.

SECOND COUNT.

And the grand jurors aforesaid, upon their oaths and [3] affirmations aforesaid, do further find, charge and present:

That on the first day of August, 1920, in the State and District of Montana, said Ray McCurry and said John Wall, whose true names are to the grand jurors aforesaid unknown, late of the State and District of Montana, on premises known and described as the Ray McCurry Ranch, situated on Section Thirty (30), in Township Four (4), North of Range Eight (8), East of the Montana principal meridian, in the State and District of Montana, and in the Internal Revenue Collection District of Montana, having then and there in their possession and custody and under their control a certain still set up, did fail and neglect to register the same with the Collector of Internal Revenue of the said United States for the said Collection District, by subscribing and filing with him duplicate statements in writing, setting forth the particular place where the said still was so set up, the kind and cubic contents of said still, the owner or owners thereof, his place of residence, or their places of residence, and the purpose for which the said still had been or was intended to be used. And so the grand jurors aforesaid, upon their oaths and affirmations aforesaid,

do say that the said Ray McCurry and said John Wall, whose true names are to the grand jurors aforesaid unknown, on the day and year aforesaid, on the premises aforesaid, in the State and District aforesaid, unlawfully did have in their possession and custody, and under their control, a still set up, which was not then and there registered as required by law; [4] contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States of America.

THIRD COUNT.

And the grand jurors aforesaid, upon their oaths and affirmations aforesaid, do further find, charge and present:

That said Ray McCurry and said John Wall, whose true names are to the grand jurors aforesaid unknown, late of the State and District of Montana, on the first day of August, 1920, in the said State and District of Montana, on premises then and there known and described as the Ray McCurry ranch, situated on Section Thirty (30) in Township Four (4) North of Range eight (8) East of the Montana principal meridian, in the State and District of Montana, unlawfully and feloniously did carry on the business of distillers by producing distilled spirits and making a mash fit for distillation and for the production of spirits, without having given bond as required by law; contrary to the form of the statute in such case made and provided and

against the peace and dignity of the United States of America.

W. W. PATTERSON,
United States Attorney for the District of Montana.

Filed October 28, 1920. C. R. Garlow, Clerk. [5]

[Indorsed on the back:] No. 3674. United States District Court, District of Montana. United States of America vs. Ray McCurry and John Wall. Indictment. A True Bill. W. D. Fenner, Foreman of Grand Jury. W. W. Patterson, United States Attorney, District of Montana.

Witnesses:
JAMES McCLARTY.
C. C. ESGAR.
ZADE MORGAN.
C. E. GILBERT.

Bonds $500.00 each.

Presented by the grand jury in open court by their foreman, in their presence, and filed this 28th day of October, A. D. 1920.

C. R. GARLOW,
Clerk. [6]

Thereafter, on January 3d, 1921, defendants were arraigned and entered their pleas of not guilty, the record thereof being as follows, to wit:

No. 3674.

UNITED STATES
vs.
RAY McCURRY and JOHN WALL.

Arraignment and Pleas.

Defendants present in court and being arraigned, they answered that their true names are, respectfully, Ray McCurry and John Wall. Thereupon the indictment was read to defendants, whereupon each of said defendants entered a plea of not guilty and setting of the case for trial was ordered continued for the present. The defendants stated that their attorneys are Miller, O'Connor & Miller.

Entered in open court January 3d, 1921.

C. R. GARLOW,
Clerk. [7]

Thereafter, on January 17th, 1921, the cause came on regularly for trial, the record of the trial, the verdict, and the judgment being as follows, to wit:

No. 3674.

UNITED STATES
vs.
RAY McCURRY and JOHN WALL.

Trial.

This cause came on regularly this day for trial, defendants present with their attorney, James F. O'Connor, Esq., and J. H. Toole, Assistant U. S. Attorney, appearing for the United States. Thereupon the following were duly impaneled, accepted and sworn as a jury to try said cause, viz: Jas. J. Shepherd, Otto Mattson, H. H. Pigott, Chas. A. McFarland, Geo. Malben, Geo. T. Baxter, John

Commers, D. L. Nelson, W. F. Burke, Chas. A. Benson, B. J. Barnekoff, and Harry T. Blaine. Thereupon, C. E. Gilbert, Jas. McClarty, Mrs. Meeker, A. Johnson, H. J. Reese, C. C. Esgar, and J. L. Eason were sworn and examined as witnesses for plaintiff, and Plaintiff's Exhibit One, being a still, and Plaintiff's Exhibit two, being a bottle, containing moonshine, introduced in evidence, whereupon plaintiff rested.

Thereupon defendants moved the Court to direct the jury to return a verdict of not guilty herein, for lack of proof, which motion was by the Court denied. Thereupon John Wall and Ray McCurry were sworn and examined as witnesses for defendants, whereupon the evidence being closed, after the arguments of counsel and instructions of the Court to certain of which instructions the defendants then and there excepted and exception noted, and also the exception of defendants being noted because the Court failed to give a requested instruction of said defendants, the jury retired to consider of their verdict. Thereafter at 4 P. M. the jury returned into court and requested further instructions, whereupon the Court, after further instructing the jury, the defendants excepting to said instructions [8] as so given, and exception noted, the jury again retired for further deliberation. Thereafter the jury returned into court with their verdict, which was received by the Court and ordered filed and read, and being as follows, to wit:

Verdict.

"We the jury in the above-entitled cause, find the defendants guilty in manner and form as charged in the indictment on file herein as to Counts Two and Three, and not guilty as to Count One.

GEORGE MALBEN,
Foreman."

Thereupon the defendants being present in court, judgment was ordered entered as follows, to wit: [9]

In the District Court of the United States, District of Montana.

No. 3674.

THE UNITED STATES OF AMERICA,
Plaintiff,

vs.

RAY McCURRY and JOHN WALL,
Defendants.

Judgment.

The United States Attorney with the defendants and their counsel present in court.

The defendants were thereupon duly informed by the Court of the nature of the charge against them as appears in the indictment herein, and of their indictment, arraignment, and pleas of not guilty and of their trial and the verdict of guilty as to counts two and three of the indictment.

And the defendants were then asked if they had any legal cause to show why judgment should not be pronounced against them, to which they replied that they had none, and no sufficient cause being shown or appearing to the Court, thereupon the Court rendered its judgment as follows, to wit:

That whereas the said defendants having been duly convicted in this court of the offense of unlawfully having in their possession and custody a certain still set up, without having registered the same as required by law, and unlawfully carrying on the business as distillers without having given a bond as required by law, committed on the 1st day of August, 1920, in the State and District of Montana, as charged in the indictment herein.

It is therefore CONSIDERED, ORDERED, AND ADJUDGED that for said offense you, the said Ray McCurry and John Wall, each be confined and imprisoned in the county jail at Helena, Montana, for the term of Nine Months, and you, the said Ray McCurry, pay [10] a fine of Five Hundred Dollars, and costs taxed at $170.90, and you, the said John Wall, pay a fine of Two Hundred Dollars, and costs taxed at $170.90, and that you be confined in said county jail until said fines are paid or you are otherwise discharged according to law. Thereupon, on motion of defendants, and for good cause, commitment ordered stayed for twenty days.

Judgment rendered and entered January 17th, 1921.

C. R. GARLOW,
Clerk.

Filed January 17th, 1921. C. R. Garlow, Clerk. [11]

Thereafter, on February 17th, 1921, notice of motion and motion for new trial was duly filed herein, as follows, to wit: [12]

In the District Court of the United States, in and for the United States of America.

UNITED STATES OF AMERICA,
Plaintiff,

vs.

JOHN WALL and RAY McCURRY, or RAY McCURRY and JOHN WALL,
Defendants.

Notice of Motion for New Trial.

To the Above-named Plaintiff and Its Attorney, GEORGE F. SHELTON, United States District Attorney for Montana.

PLEASE TAKE NOTICE: That the above-named defendants intend to move the Court, and do hereby move the Court, to set aside and vacate the judgment made, entered and filed on the 17th day of January, A. D. 1921, and to grant a new trial of the said cause or case for the following causes which materially affected the substantial rights of the defendants, namely:

(1) Newly discovered evidence material to the defendants which they could not with reasonable diligence have discovered and produced at the trial.

(2) Error in law occurring at the trial and excepted to by the defendants.

Said notice will be made upon the bill of exceptions hereinafter to be prepared and served upon you and upon the minutes of the court record.

MILLER, O'CONNOR & MILLER,
By JAS. F. O'CONNOR,
Attorneys for Defendants. [13]

Due, timely and legal service of the foregoing notice of intention for a new trial and receipt of a true copy thereof is hereby acknowledged this 16th day of February, 1921.

GEORGE F. SHELTON,
United States Attorney,
For Plaintiff.

Filed February 17, 1921. C. R. Garlow, Clerk. [14]

Thereafter, on July 2d, 1921, the decision and order of the Court denying new trial was filed herein, as follows, to wit: [15]

In the District Court of the United States in and for the District of Montana.

UNITED STATES
vs.
McCURRY & WALL.

Decision and Order Denying New Trial.

Defendant's motion for a new trial upon accusation of illicit liquor manufacture is saved from

plaintiff's objection that the Court is without jurisdiction to hear the motion at the term succeeding that at which it was filed, the rule of Klein's Case, 140 Fed. 213, by court rule 74, which provides that the motion filed "shall be deemed to be entertained." The motion fails to specify the particular error of law relied upon as required by said rule, but the bill of exceptions filed with it and which the rule does not contemplate for use upon the motion, though commonly so used, containing only the Court's charge and two exceptions to parts of it, will be taken to supply the omission. One exception is to the definition of reasonable doubt.

The Court gave the classical definition of Webster's case, viz., that state of the evidence in view of which jurors "cannot say they feel an abiding conviction to a moral certainty of the truth of the charge," in both affirmative and negative forms. This seems so much a sing-song incantation which as Bishop says (1 Bish. Cr. Pro., sec. 1094) is calculated "to darken more minds of the classes from whom our jurors are mainly drawn than it will enlighten," even in Boston where it originated, that to render it more clear the Court also stated it in words of more common use, being synonyms and equivalents, viz., that "abiding conviction" is a "judgment that persists in staying with you," and "moral certainty" is a "high degree of probability." And the jury were told proof of guilt could not and so need not attain absolute certainty, that it could not rise above probability in some degree, and that when proven to that "high degree of probability

that creates in your minds an abiding conviction to a moral certainty that he is guilty," there was no reasonable doubt and was duty to convict. This, says the Supreme Court in Dunbar's Case, 156 U. S. 199, "is unquestionably the law." The jury was not led to believe the verdict was to be based on the doctrine of chances. The nature of evidence, proof, probability and certainty was thus explained to them to meet counsel's halted endeavor to argue to them that a verdict of guilty could not be found upon [16] probabilities, however strong or great, which is not law.

In no case does proof rise above a degree of probability. In no case is there absolute certainty, not even upon a plea of guilty, false pleas of guilty being experienced by most trial courts.

The other exception is to the instruction that from the circumstances, there being no direct evidence, could be inferred or presumed that defendants had not registered the still nor filed bond; that by their denials of ownership, interest in and knowledge of the still, they practically admitted both failure to register and failure to give bond; that if they had registered the still and filed bond, no one better knew it than defendants and they easily could have so testified; that plaintiff did not permit registery of stills of the character involved in remote timber groves nor accept bonds therefor; and that the inference or presumption so created, the burden shifted to defendants to rebut it. And this too is law.

See Faraone vs. U. S., 259 Fed. 509. U. S. vs. Turner, 266 Fed. 251.

The motion is denied.

July 2d, 1921.

BOURQUIN,
J.

Filed July 2d, 1921. C. R. Garlow, Clerk. [17]

Thereafter, on July 2d, 1921, bill of exceptions was duly settled and allowed, and filed herein, being as follows, to wit: [18]

In the District Court of the United States in and for the District of Montana.

UNITED STATES OF AMERICA,
Plaintiff,

vs.

McCURRY and WALL,
Defendants.

Bill of Exceptions.

BE IT REMEMBERED that this cause came on regularly for hearing on Monday, January 17, 1921, at ten o'clock A. M., before the Honorable George M. Bourquin, Judge presiding, and a jury of twelve, which were regularly empanelled.

The Government being represented by George H. Shelton, Esquire, United States District Attorney, and J. F. O'Connor, Esquire, represented the defendants.

Whereupon the following proceedings were had and done:

(Introduction of Testimony.)

MONDAY AFTERNOON—January 17, 1921.

Instructions of the Hon. George M. Bourquin, Judge.

Gentlemen of the Jury:

You have heard the evidence and the argument of counsel, and it is now for the Court to deliver to you what is termed the charge, or instructions. That, as a rule, is to make you acquainted with the law that applies to the case, and which you apply in finally arriving at and rendering your verdict.

It is true the Court may also in its instructions or charge discuss the evidence, and might even express an opinion upon the facts in respect to what witnesses seem to the Court to be creditable, and whether or not the defendants are guilty or not guilty. Rarely, however, does a Court go as far as to express [19] its opinions, but even if it does, they are not binding upon the jury; and they are never expressed in an attempt or hope to bind you, because the Court has no such power, but only to endeavor to aid you to reason the case to a correct conclusion. You are the exclusive judges of the facts; what conclusions you arrive at from the evidence; what witnesses to believe. The Court is the exclusive judge of the law. You accept the law from the Court as the Court states it to you because that is the law, and we all accept the facts from you as you determine them by your verdict.

The indictment in this case, which is not evidence

but merely the written charge against the defendants, accuses them of having in last August fermented a certain mash fit for the production of spirits at a place other than a duly authorized distillery.

There is an act of Congress providing that whoever makes a mash fit for the production of spirits at a place other than an authorized distillery, if convicted by a jury shall be punished accordingly.

The second count charges the defendants with having in their control and in their custody a still for the production of spirits without having registered the same with the Commissioner of Internal Revenue for the district,—the Collector of Internal Revenue.

The law is that if anyone should set up a still he shall register it with the Collector of Internal Revenue for the district. If he does not do so he commits an offense and shall be punished as the law directs.

The third count is that these defendants engaged in the business of distilling intoxicating liquors without having given the bond as required by law. The law also requires that all [20] persons who engage in distilling shall give a bond to comply with the law, and the law is that they shall pay the taxes, and the object of that law, as I have stated to you, is so as to enable the Collector of Internal Revenue to collect the taxes that are due from those who distill intoxicating liquors. These laws are still in force even if we have prohibition against the manufacture and use of liquor as a beverage; because we will still

have distilleries, and operators must still register them and give bonds, and must still make their mashes at no other place. The law is so written and it is your duty and mine to follow the law without any question.

I think we can all agree also that the law in reference to distilleries and collection of taxes upon them is a good law.

The defendants have pleaded not guilty to these charges. You might find one of them guilty of all these charges, or any one of them, or both of them of any one of the charges, depending upon your opinion and judgment in view of the evidence; or you might find them not guilty of any or all of these charges, depending entirely on your view of the evidence. You might convict one or acquit the other, you might convict both or acquit both, depending upon your judgment from the evidence.

The defendants having plead not guilty, that imposes upon the Government the burden of proving to your satisfaction that they are guilty beyond a reasonable doubt before you can justly convict them. They are presumed to be innocent at the commencement of the trial. We do not know that they are innocent or guilty, knowing nothing of the case. So that the law creates a presumption of innocence in their favor. You will bear that in mind throughout the trial, and in the light of it, you weigh the evidence against them and for them to determine whether or not that [21] presumption of innocence is overcome, and to a degree that satisfies you that they are guilty beyond a reasonable doubt.

Whenever the presumption of innocence has been overcome by the evidence to that degree that you are satisfied that they are guilty beyond a reasonable doubt, the presumption of innocence disappears from the case and it will be your duty to find them guilty.

When I say the Government must prove them guilty beyond a reasonable doubt, you take into consideration also the evidence that the defendants have submitted in their own behalf, and weighing it all together, considering it altogether determine whether or not they are guilty beyond a reasonable doubt. Remember that the proof before they can be found guilty is only that they are guilty beyond a reasonable doubt. Not beyond all doubt or any doubt, or a suspicion that after all they may be innocent, but only beyond a reasonable doubt. It is difficult to define a reasonable doubt more clearly than those words themselves express. The Courts say that a reasonable doubt means that there is something in the evidence, or something lacking in the evidence, that causes you to pause, as honest jurors endeavoring to do justice between the accused and the Government and to say to yourself that you doubt the guilt of the defendants; but that is not enough; it must also cause you to go further and say to yourself as intelligent men that it is reasonable to doubt the guilt of the defendants. Another way to define reasonable doubt is that after you have reviewed all the evidence, if you have not an abiding conviction (that is to say, a judgment that persists in staying with you) that to a moral cer-

tainty (that is to say, to a high degree of probability) they are guilty, you have what the law terms a reasonable doubt and are bound to acquit them. On the [22] other hand, if after you have reviewed all the evidence you have a settled judgment that persists in staying with you that to a high degree of probability the defendants are guilty, you have no reasonable doubt, and it is equally your duty to convict them.

You are the sole and exclusive judges of the credibility of the witnesses, and of the weight to be given to evidence. You see the witnesses, you observe their demeanor, the fashion in which they testify; whether their statements are reasonable or unreasonable. That which is reasonable is generally a pretty good test of the truth. You also take notice of whether the witnesses appeared to be biased or prejudiced, or that they have an interest or motive to serve; whether they are contradicted by facts or by other witnesses, or whether they are contradicted by circumstances. You are not bound to believe anything a witness says simply because he swears it is so. My honored predecessor, Judge Knowles, used to explain that to the jury in this fashion: "Just because a witness swears it is so, you do not need to believe it unless it recommends itself to your judgment. A witness may come on the witness-stand and testify that he saw an elephant climb a telegraph-pole. You are not obliged to believe him even if he takes you down and shows you the post." Remember, it is for you to determine where the truth is among the witnesses. All witnesses are

presumed to speak the truth. The office of a witness is nothing but to aid you to arrive at the truth. If he departs from that office you are not obliged to give him the benefit of any presumption that he speaks truthfully. The presumption that he speaks the truth does not prevail where two witnesses flatly contradict each other. That has happened here. They both cannot speak the truth, there is no presumption, and you determine which of those conflicting witnesses speak the truth. There is another [23] rule of law that if a witness testifies falsely in any one particular you are at liberty to mistrust all the balance of the testimony of that witness. If he testifies falsely in one particular, whether by mistake or wilfully, he may have testified falsely in other particulars. If you believe the witness has testified falsely in any one particular, if your judgment approves, you may reject all the testimony of that witness as unreliable.

When the defendants testify in their own behalf, in so far as they are not contradicted by circumstances or other witnesses, they are entitled in the beginning to that same presumption that they speak the truth; but remember you may see in their testimony, or demeanor, or their interest, or in circumstances, reasons why they are not entitled to that presumption that they speak the truth. Never forget that the defendants are interested. They are charged with serious offenses, consequences will be grave to them if they are convicted, and you ask yourselves whether they, or either of them, has departed from the truth in the hope to deceive you,

and to escape the consequences of their offending against the law, if they have offended.

Now, Gentlemen of the Jury, the evidence is fairly brief in this case. It seems that the officers undoubtedly secured information that someone was running a still up in this country on the border of Park and Gallatin counties, and they went out and searched. They came to a place where an old still apparently had been established, and recently removed. The debris evidenced it. Gilbert said the tracks that led from that old still, the wagon tracks, went up as far as they could go, and then the foot tracks lead on further and looked as tho they might have been a day or two old. They proceeded to follow and those tracks lead them to defendant McCurry's ranch some four or five miles away. The old still had been in a very wild country, rugged and wooded. As they came down to McCurry's ranch, Gilbert stated that he saw [24] smoke coming from a cottonwood grove, and from that grove he saw the defendant McCurry proceeding with his wagon toward the barn. One of them went down to the barn, possibly both, and they proceeded to arrest McCurry. Gilbert went down to that grove and he found a still in operation, this particular still that is before you, and a large quantity of mash, some seven or eight or ten tubs of 25 or 30 gallons each. The still was on a big fireplace, fire under it, and Gilbert said defendant Wall was there stirring the mash in the still. He also found some 30 gallons of moonshine liquor, which would indicate that still had been running some little time.

The mash and the liquor may have been made somewhere else and carried there. The mash was there and tests of the liquor showed that it was 30 per cent proof, which would be about 15 per cent of alcohol, very highly intoxicating, and intoxicating liquor within the meaning of this law. Furthermore, near this still a few yards, I don't remember how many, possibly fifty, near this still was a tent and in that tent was the defendant Wall's wife and a couple of little children. They proceeded up to the barn where they had already arrested McCurry, and there was some search made, just how much was not stated. Nothing apparently was found; apparently no liquor; no evidence of any, but there was a buggy standing within a few feet of defendant McCurry's house. In that buggy were some jugs which had evidently had moonshine in them.

There is some relationship between these defendants. The brother of defendant McCurry is married to a sister of the defendant Wall, a relationship which at least would create possibly great friendliness, and undoubtedly great friendliness existed between these defendants.

This grove was on the defendant McCurry's place, who claims to be a rancher and stockgrower, and within sight of his house, where it was carried on. [25]

Now, from the evidence the Government asks you to infer that these defendants had made the mash; had the still in their custody and were in the business of distillers, and the Court will say to you that the evidence will sustain that inference. The Court

does not say that you should draw that inference, that is left for you to say, but in the eyes of the law the evidence is sufficient to go to you and upon it you can determine that these two men are guilty, if your judgment approves. It is left entirely to your judgment, not to the Court's. If the evidence did not warrant a verdict of guilty, the Court would never submit the case to you.

Defendants testified, both testified, that they knew nothing of the old still; they knew nothing of the new still until Wall came into contact with it the day the officers were there. It was a coincidence, according to his statement, that he came to McCurry's place the night before, and went to pick berries down to this grove where this still was. Wall testified that a man named Bradley was running the still. Wall testified he was there twice, once in the afternoon when Gilbert found him, when Bradley was out for a load of wood. Wall first told you that he couldn't say whether he was stirring the mash or not; finally he said he was not stirring the mash, thus placing himself in flat contradiction to the testimony of Gilbert. Did Gilbert tell you the truth, or did Wall fear that if he was stirring the mash, it would be taken as evidence against him, and did he deny it in the hope to deceive you? Has Gilbert any purpose to serve by stating these incriminating circumstances, or has Wall an interest to serve by denying it? The still on the land of McCurry's, in view of all the circumstances, is sufficient to warrant you in finding that both he and Wall were in the possession of the still, and operating it to-

gether, having made the mash in the business of distillers. I say it will warrant you. I say also it is for you to determine whether you will draw that inference. [26]

McCurry tells you that he never knew anything about the still. He tells you that he was not down to the grove there, when Gilbert says he was. He puts himself into flat contradiction to Gilbert. The question will be for you to determine who is telling the truth. Mrs. Meeker testified that McCurry had warned her not to go up that gulch where the old still had been; told her there was vicious wolves and bears. McCurry denied that. He said he never told her anything of that sort. Why should Mrs. Meeker testify to that if that is not so. Why should McCurry deny it if it is so? Is it so? Is Mrs. Meeker telling the truth and does McCurry deny it lest otherwise the warning be taken as attempts to prevent her discovery of the old still? Was he endeavoring to keep her from hunting cows in that neighborhood for fear that she should discover this old still, or is he telling the truth? Remember his interest, and ask yourselves what is her motive to deceive you.

McCurry further says that the buggy in which the jugs were was not his; they belonged to a man named Pincox. It is true that he has not brought Pincox here. Possibly he would be justified in any event because Pincox could not be asked to incriminate himself. He said he was not at the grove. I think he said he was down near there making hay with Smith. You observed Smith didn't corroborate him in that particular. It is a circumstance to be noted.

If the buggy was his and his jugs smelling of moonshine, it is a circumstance to be considered in connection with all of the others.

You must remember, Gentlemen of the Jury, in weighing evidence and in endeavoring to determine where the truth lies, you do not look at one circumstance alone and dispose of it and say we will throw this out, and not consider it, and then go to other circumstances and thus dispose of one at a time. Very often cases are proved by circumstances, not one of which alone would be [27] sufficient to warrant a conviction, but when you view them altogether are convincing of guilt. Remember that when you are considering this evidence.

It appears in the proof these defendants are from the southern country, where it is a matter of history that there is a habit of putting stills out in the brushes. There is evidence as to the length of time that the still was down at the grove. Gilbert said that apparently the posts that were put down indicated it might have been there a week; either had been there some time or the materials were brought there from some place. Either that mash was made there or hauled there, either of which might have been done. It is a question for you to determine whether these defendants had this still in a remote section, and whether they finally becoming bolder, they would bring it down closer to McCurry's place.

The evidence is before you. The case goes to you now for you to make up your judgment. The Court will conclude as it began, that these defendants are presumed to be innocent, and that presumption re-

quires that you acquit them unless after your review of all the evidence you believe it is overcome to a degree that satisfies you that they are guilty beyond a reasonable doubt; and if you are satisfied that they are guilty beyond a reasonable doubt it is your duty to convict them.

When you retire to your jury-room you will select one of your number foreman and proceed to a verdict. It takes twelve of your number to agree upon any verdict in this case.

The Court overlooked one matter. Counsel was arguing; he proceeded to lay down his view of the law that you could not convict on suspicion. That is true, Gentlemen of the Jury, but he went on to say that you could not convict on probabilities, and there the Court interrupted him, and stated that that was not the law. That [28] is not the law, because after all, all cases are determined upon probabilities. There is no such thing as absolutely proving the guilt of the defendants, and guilt never needs to be proven to an absolute certainty because that is impossible. It needs only be proven to that high degree of probability that creates in your minds an abiding conviction to a moral certainty that he is guilty. In this court you are dealing with the law of the United States. That law is that when you form from the evidence a judgment that persists in staying with you that to a high degree of probability the defendant is guilty, you have no reasonable doubt, the law is satisfied, and it is your duty to convict. But counsel had in mind other law that he was stating to you. I simply state that so that

you will not believe that counsel was attempting to distort the law. That is not the duty of any counsel. The duty of every counsel is to aid the jury to an honest consideration of the case and a just conclusion. Counsel for the defendant and the Government owe their first duty to the administration of justice and not to their client.

By Mr. O'CONNOR.—We take exception to the instruction of the Court wherein the Court advises the jury that the evidence tending to show a probability of the guilt of the defendants is sufficient to warrant a conviction.

By the COURT.—Well, the Court didn't put it that way, but the Court is satisfied as it stated it, and your objection and exception in that form will be noted.

The jury came into court for further instruction, asking whether it could consider that there was no evidence of defendants' failure to register the still and to file bond; thereupon the Court instructed that in this case, as in all illicit liquor cases, the prosecution need prove only the circumstances from which can be presumed lack of registry and bond filed, whereupon the burden shifted to defendants to prove registry and bond filed. That in [29] this case the circumstances in evidence on the part of the United States, in respect to the still, raised such presumption which was full and complete proof. That the Government did not register stills in cottonwood groves in remote places and of the poor character of this, nor allow bonds therefor. That to remember, too, that defendants denied all

ownership or operation of the still or any interest or participation therein, to relieve themselves of any duty to register or file bond and as a defense to failure therein. That if they registered and filed bond, no one knew it better than they did and they easily could have so testified. That in the circumstances the burden was on defendants to submit this evidence and they had not, and the presumption was that they had not registered or filed bond, which presumption or inference was complete proof of the failure charged against them; and the jury ought to so find.

Thereupon defendants objected and excepted to so much of the instruction as advised the jury that the burden is on defendants to show registration of the still and filing of bond.

MILLER, O'CONNOR & MILLER,
By A. C. PELLETER,
Attys. for Defts.

Service of the foregoing bill of exceptions and receipt of copy thereof hereby acknowledged this —— day of February, 1921.

_____,
District Atty.

Corrected to accord with facts and to render sensible, and approved and settled June 30th, 1921.

BOURQUIN,
J.

Filed July 2d, 1921. C. R. Garlow, Clerk. [30]

Thereafter, on July 8th, 1921, petition for writ of error was duly filed herein, as follows, to wit. [31]

In the District Court of the United States, District of Montana, Helena Division.

THE UNITED STATES OF AMERICA,
Plaintiff,

vs.

RAY McCURRY and JOHN WALL,
Defendants.

Petition for Writ of Error and for Supersedeas and Bail.

To the Honorable District Court of the United States, District of Montana:

And now come Ray McCurry and John Wall, the defendants in the above-entitled cause, and feeling themselves aggrieved by the verdict of the jury and the judgment of the District Court of the United States, for the District of Montana, entered on the 17th day of January, 1921, hereby petition for an order allowing them, said defendants, to prosecute a writ of error from the United States Circuit Court of Appeals for the Ninth Circuit to the District Court of the United States, for the District of Montana; that said writ of error may be made a supersedeas, and that your petitioners be released on bail in an amount to be fixed by the judge thereof pending the final disposition of said writ of error. As-

signment of errors is filed with this petition.

RAY McCURRY and
JOHN WALL.
By MILLER, O'CONNOR & MILLER,
Their Attorneys.

Filed July 8, 1921. C. R. Garlow, Clerk. [32]

Thereafter, on July 8th, 1921, assignment of errors was duly filed herein, as follows, to wit: [33]

In the District Court of the United States, District of Montana, Helena Division.

RAY McCURRY and JOHN WALL,
Plaintiffs in Error,
vs.
THE UNITED STATES OF AMERICA,
Defendant in Error.

Assignment of Errors.

And now come Ray McCurry and John Wall, the plaintiffs in error, and each for himself and in connection with his petition for a writ of error jointly with the other, says: That in the record, proceedings and judgment aforesaid error has intervened to his prejudice, to wit:

First. The District Court of the United States for the District of Montana erred in instructing the jury in the trial of said cause that evidence tending to show the probability of guilt of the defendants was sufficient to warrant a conviction, to the giving

of which instruction the defendants excepted before the going out of the jury.

Second. The District Court of the United States for the District of Montana erred in instructing the jury that the burden was upon the defendants to show the registration of the still and the filing of the bond, to the giving of which instruction the defendants excepted before the going out of the jury.

Third. The said Court erred in refusing to give an instruction asked by the defendants reading as follows:

> "You are instructed that mere suspicions or probabilities, however strong, are not sufficient to warrant a conviction."

Fourth. The said Court erred in rendering and entering judgment against the defendants. [34]

WHEREFORE said plaintiffs in error pray that the said judgment of the District Court of the United States for the District of Montana may be reversed and held for naught.

MILLER, O'CONNOR & MILLER,
Attorneys for Petitioners.

Filed July 8, 1921. C. R. Garlow, Clerk. [35]

Thereafter, on July 8th, 1921, order allowing the writ of error was filed herein, as follows, to wit: [36]

In the District Court of the United States, District of Montana, Helena Division.

THE UNITED STATES OF AMERICA,
Plaintiff,

vs.

RAY McCURRY and JOHN WALL,
Defendants.

Order Allowing Writ of Error and Admitting Defendants to Bail.

Let a writ of error issue from the United States Circuit Court of Appeals for the Ninth Circuit to the United States District Court for the District of Montana, as prayed for in the petition of the said Ray McCurry and John Wall; and that a citation be issued to the defendant in error.

And, it now appearing that a citation has been served in said cause, IT IS NOW ORDERED, that a writ of error, allowed as above stated, operate as a supersedeas, and that defendants be admitted to bail, upon furnishing a bond in the penal sum of One Thousand Dollars, conditioned according to law, to be approved by me, said bond to operate also as a bond on error as well as a bail bond.

BOURQUIN,
Judge.

Filed July 8, 1921. C. R. Garlow, Clerk. [37]

Thereafter, on July 14th, 1921, bond on writ of error was duly filed herein, as follows, to wit: [38]

In the District Court of the United States in and for the District of Montana.

THE UNITED STATES OF AMERICA,
Plaintiff,

vs.

RAY McCURRY and JOHN WALL,
Defendants.

Bond on Writ of Error.

KNOW ALL MEN BY THESE PRESENTS, that we, Ray McCurry and John Wall, of the county of Park, State of Montana, as principals, and John Hogan, J. E. Swindlehurst, J. W. Jamieson, J. T. McCurry, as sureties, are held and firmly bound unto the United States of America in the full and just sum of One Thousand ($1,000.00) Dollars, to be paid to the United States of America, which payment, well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally by these presents.

Sealed with our seals and dated this 12th day of July, in the year one thousand nine hundred and twenty-one.

Whereas, lately on the 17th day of January, 1921, at the term of the District Court of the United States for the District of Montana, in a cause pending in said court between the United States of America, plaintiff, and Ray McCurry and John

Wall, defendants, a judgment and sentence was rendered against said Ray McCurry and John Wall, and said Ray McCurry and John Wall obtained a writ of error from the United States Circuit Court of Appeals for the Ninth Circuit to the said United States District Court to reverse the judgment and sentence in the aforesaid suit, and a citation directed to the United States of America, citing and admonishing the United States of America to be and appear thirty days from and after the date thereof, which citation has been fully served.

Now, therefore, the conditions of said obligation is such that if the said Ray McCurry and John Wall shall prosecute their writ of error to effect and answer all damages and costs if they fail to make their plea good, and shall appear in person in the [39] United States Circuit Court of Appeals for the Ninth Circuit when said cause is reached for argument, or when required by law or rule of said Court, and from day to day thereafter in said court until said cause shall be finally disposed of, and shall abide by and obey the judgment and all orders made by said Court of Appeals in said cause, and shall surrender themselves in execution of the judgment and sentence appealed from as said Court may direct, if the judgment and sentence against them shall be affirmed, and if they shall appear for trial in the District Court of the United States for the District of Montana, on such day or days as may be appointed for a retrial by said District Court and abide by and obey all orders of said Court, provided the judgment and sentence against them shall be

reversed by the United States Circuit Court of Appeals, then the above obligation to be void; otherwise to remain in full force and effect.

JOHN WALL,
RAY McCURRY,
Principals.
JOHN HOGAN.
J. E. SWINDLEHURST.
J. W. JAMIESON.
J. T. McCURRY.

The foregoing bond on error is hereby approved this 14th day of July, 1921.

W. H. MEIGS,
Assistant U. S. Attorney. [40]

State of Montana,
County of Park,—ss.

John Hogan, J. E. Swindlehurst and John W. Jamieson, whose names are subscribed as the sureties to the foregoing bond or undertaking, being severally duly sworn, each for himself, deposes and says that he is worth the sum in the said undertaking specified as the penalty thereof, over and above all his just debts and liabilities, exclusive of property exempt by law from execution.

JOHN HOGAN.
J. E. SWINDLEHURST.
J. W. JAMIESON.

Subscribed and sworn to before me this 13th day of July, 1921.

JAMES F. O'CONNOR,
Notary Public for the State of Montana, Residing at Livingston, Montana.

My commission expires Feb. 11, 1922.
Filed July 14th, 1921. C. R. Garlow, Clerk. [41]

Thereafter, on July 14th, 1921, a citation was duly issued herein, which original citation is hereto annexed and is in the words and figures following, to wit: [42]

In the District Court of the United States, District of Montana, Helena Division.

RAY McCURRY and JOHN WALL,
Plaintiffs in Error,

vs.

THE UNITED STATES OF AMERICA,
Defendant in Error.

Citation on Writ of Error.

The President of the United States to the United States of America, GREETING: To the United States of America.

YOU ARE HEREBY CITED AND ADMONISHED to be and appear at the United States Circuit Court of Appeals for the Ninth Circuit, at the city of San Francisco, State of California, within 30 days from the date of this writ, pursuant to a writ of error allowed by the District Court of the United States in and for the District of Montana, and filed in the clerk's office of said Court on the 14th day of July, 1921, in a cause wherein Ray McCurry and John Wall are plaintiffs in error and the United States of America is defendant in error, to show

cause, if any, why the judgment and sentence rendered against the said plaintiffs in error should not be corrected and why speedy justice should not be done to the parties in that behalf.

WITNESS the Honorable GEORGE M. BOURQUIN, Judge of the District Court of the United States in and for the District of Montana, this 14th day of July, 1921.

BOURQUIN,
District Judge.

[Seal] Attest: C. R. GARLOW,
Clerk.
By H. H. Walker,
Deputy. [43]

Due personal service of within citation made and admitted and receipt of copy acknowledged this 14th day of July, 1921.

W. H. MEIGS,
Attorney for U. S.

[Endorsed]: No. 3674. In the District Court of the United States in and for the District of Montana, Helena Division. Ray McCurry et al., Plaintiffs in Error, vs. The United States of America, Defendant in Error. Citation. Filed July 14th, 1921. C. R. Garlow, Clerk. By ————, Deputy Clerk. [44]

Thereafter, on July 14th, 1921, writ of error was duly issued herein, which original writ is hereto annexed and is in the words and figures following, to wit: [45]

In the District Court of the United States, District of Montana, Helena Division.

RAY McCURRY and JOHN WALL,
Plaintiffs in Error,

vs.

THE UNITED STATES OF AMERICA,
Defendant in Error.

Writ of Error.

United States of America,—ss.

The President of the United States of America, to the Honorable GEORGE M. BOURQUIN, Judge of the United States District Court for the District of Montana, and to the District Court of the United States for the District of Montana, GREETING:

BECAUSE in the record and proceedings, and also in the rendition of the judgment, of a plea which is in said District Court, before you, between the United States of America, plaintiff, and Ray McCurry and John Wall, defendants, manifest error hath occurred and happened to the said defendants Ray McCurry and John Wall, as by their petition for a writ of error and assignment of errors appears, we, being willing that such error, if any there hath been, should be duly corrected, and

full and speedy justice done to the parties aforesaid, in this behalf, do command you if judgment therein given that then under your seal, distinctly and openly, you send the records and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals for the Ninth Circuit, at San Francisco, in the State of California, together with this writ, so that you have the same at the city of San Francisco, in the State of California, within thirty days from the date of this writ in said Circuit Court of Appeals, to be then and there held, that, the records and proceedings aforesaid, being inspected, the said Circuit Court of Appeals [46] may cause further to be done therein to correct that error what if right and according to the laws and customs of the United States should be done.

WITNESS the Honorable WILLIAM HOWARD TAFT, Chief Justice of the United States, this 14th day of July, A. D. 1921, and of the Independence of the United States the one hundred and forty-sixth.

[Seal] C. R. GARLOW,
Clerk of the District Court of the United States,
District of Montana.

By H. H. Walker,
Deputy.

Due personal service of the foregoing writ of error made and admitted and receipt of a copy

thereof acknowledged this 14th day of July, A. D. 1921.

W. H. MEIGS,
Asst. United States District Attorney for the District of Montana. [47]

Answer of Court to Writ of Error.

The Answer of the Honorable, the District Judge of the United States for the District of Montana, to the foregoing writ:

The record and proceedings whereof mention is within made, with all things touching the same, I certify, under the seal of the said District Court of the United States, to the Honorable, the United States Circuit Court of Appeals for the Ninth Circuit, within mentioned, at the day and place within contained, in a certain schedule to this writ annexed, as within I am commanded.

By the Court.

[Seal] C. R. GARLOW,
Clerk. [48]

[Endorsed]: No. 3674. In the District Court of the United States in and for the District of Montana, Helena Division. Ray McCurry and John Wall, Plaintiffs in Error, vs. The United States of America, Defendant in Error. Writ of Error. Filed July 14th, 1921. C. R. Garlow, Clerk. By ————, Deputy Clerk. [49]

Certificate of Clerk U. S. District Court to Transcript of Record.

United States of America,
District of Montana,—ss.

I, C. R. Garlow, Clerk of the United States District Court for the District of Montana, do hereby certify and return to the Honorable, the United States Circuit Court of Appeals for the Ninth Circuit, that the foregoing volume, consisting of 49 pages, numbered consecutively from one to 49, inclusive, is a full, true and correct transcript of the record and all proceedings had in said cause, and the whole thereof, as appears from the original record and files of said court in my custody as such clerk; and I do further certify and return that I have annexed to said transcript and included within said pages the original citation and writ of error issued in said cause.

I further certify that the costs of the transcript of record amount to the sum of seventeen and 45/100 Dollars ($17.45), and have been paid by the plaintiff in error.

WITNESS my hand and the seal of said court at Helena, Montana, this 30th day of July, A. D. 1921.

[Seal] C. R. GARLOW,
Clerk. [50]

[Endorsed]: No. 3747. United States Circuit Court of Appeals for the Ninth Circuit. Ray McCurry and John Wall, Plaintiffs in Error, vs.

United States of America, Defendant in Error. Transcript of Record. Upon Writ of Error to the United States District Court of the District of Montana.

Filed August 9, 1921.

F. D. MONCKTON,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

By Paul P. O'Brien,
Deputy Clerk.